Outokumpu Copper Franklin, Inc. and United Steelworkers of America, AFL-CIO-CLC, Petitioner. Case 26–RC-8236

June 6, 2001

DECISION ON REVIEW AND ORDER BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On February 21, 2001, the Regional Director for Region 26 issued a Decision and Direction of Election in which he found appropriate the petitioned-for unit of production and maintenance employees, excluding temporary employees supplied by three staffing agencies. Thereafter, in accordance with Section 102.67, the Employer filed a timely request for review of the Regional Director's decision. The Employer contends that the Regional Director erred in refusing to decide whether it is a joint employer with the three staffing agencies, and that the temporary employees must be included in the unit found appropriate. On March 21, 2001, the Board granted the Employer's request for review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the entire record in this proceeding, we conclude that the Regional Director did not err in finding it unnecessary to address the joint employer issue because the Employer is a statutory employer of the temporaries and the Union named only the Employer in the petition. However, we conclude, contrary to the Regional Director, that the temporary employees supplied by the staffing agencies share such a strong community of interest with the employees in the unit found appropriate that their inclusion is required.

The Employer manufacturers light wall copper tubing at its facility located in Franklin, Kentucky. Its regular work force includes approximately 238 full-time and "introductory" employees¹ who are engaged in production and maintenance functions. The regular work force is supplemented by approximately 34 temporary employees (temporaries) that the Employer obtains from three staffing agencies (the suppliers).

Based on criteria determined by the Employer, the suppliers hire temporaries for the Employer. The temporaries report for work at the Franklin facility, where they are assigned and directed by the Employer's supervisors. The suppliers do not have any supervisors on the Employer's worksite. Temporaries work side-by-side with the Employer's production and maintenance employees in all areas of the plant. They perform the same work, on

the same shifts, and under the same supervision. The Employer's supervisors retain full authority to discipline, discharge, or send home temporaries. They also evaluate temporaries for future employment with the Employer as regular employees. Except for skilled maintenance electricians, the pool of temporaries is the sole source for the Employer's regular production and maintenance workforce.² Wage rates for the temporaries are determined exclusively by the Employer. Temporaries receive lower wages than regular employees and are subject to a different attendance policy. They are also ineligible for Employer benefits and for accrual of seniority.

As a threshold matter, the Employer contends that the Regional Director erred in declining to decide whether the Employer is a joint employer with the suppliers of the temporaries. Because there is no dispute that the Employer is a statutory employer of the temporaries,³ and the Petitioner seeks to bargain only with the Employer, we agree that the Regional Director did not have to reach the joint employer issue. See *Professional Facilities Management*, 332 NLRB No. 40 (2000).⁴

The issue in this case is whether the temporaries—supplied by various suppliers to the user Employer—must be included in a unit of the user Employer's solely employed employees. As the Regional Director correctly noted, this analysis is governed by *M.B. Sturgis*, 331 NLRB 1298 (2000), which requires traditional community of interest factors to be applied. The Regional Director found that the common working conditions between the regular employees and the temporaries are not sufficient to require their inclusion in the unit found appropriate. We disagree.

The Regional Director acknowledged that the regular and temporary workers share common working conditions, but he concluded that the dissimilar terms and conditions support excluding the temporaries from the unit. In this regard, he relied on the fact that the suppliers hire the temporaries and pay their workers' compensation, the temporaries receive lower hourly wage rates, they are ineligible for certain Employer benefits and seniority, and they have a different attendance policy.

¹ Introductory employees are expected to become regular, full-time employees after 60 days and receive no benefits.

² Temporary workers are assigned to the Employer's facility for a maximum of 15 months. If they have not been hired into a full-time position by that time, they must serve a 3-month hiatus period before they can return to the Employer's facility as a temporary employee.

³ The record establishes, and in its request for review the Employer concedes, that the Employer has "exclusive control" over almost every meaningful aspect of the temporary workers' employment.

⁴ In its posthearing brief, the Petitioner reserved the right to amend the petition to name the supplier employers if the temporaries were included in the unit. If the Petitioner does so amend the petition, the Regional Director will need to address whether the suppliers are joint employers of the temporaries.

We find that these dissimilar terms and conditions of employment are substantially outweighed by the many common terms and conditions of employment shared by the regular and temporary employees. The temporaries work side-by-side with the regular production employees. Temporaries and regular employees perform the same work functions and are supervised by the same supervisors. The Employer has four shifts, and the temporaries, like the regular employees, are assigned to all four. The regular and temporary employees work in the same plant areas and are part of the same production operations.

Further, nearly all their terms and conditions of employment, including assignments, directions, discipline, and wages, are controlled by the Employer. The Employer's supervisors evaluate the temporaries for future employment in the Employer's regular work force. Temporaries are the sole source for the Employer's regular work force, except maintenance electricians. Although the suppliers hire temporaries, the hiring is based on criteria determined by the Employer. Similarly, although the suppliers pay workers' compensation for the temporaries, they are effectively reimbursed by the Employer through the service fee paid by the Employer to the suppliers. Further, the temporaries' attendance policy is determined solely by the Employer. Finally, al-

though the temporaries do not receive benefits, neither do the introductory employees, who are included in the unit. Under these circumstances, we find that the temporaries' lower wages, lack of benefits, lack of seniority, and different attendance policy are insufficient to exclude the temporaries from the unit found appropriate. We, therefore, conclude that the temporaries share such a strong community of interest with the employees in the unit found appropriate that their inclusion is mandated.

ORDER

We reverse the Regional Director's finding that the petitioned-for unit of production and maintenance employees, excluding temporary employees, is appropriate. This proceeding is remanded to the Regional Director for further appropriate action consistent with this Decision.

⁵ This case is distinguishable from *Holiday Inn City Center*, 332 NLRB No. 128 (2000), in which the Board denied review of a finding that the inclusion of jointly employed employees was not required in a unit of solely employed employees. In *Holiday Inn*, unlike here, none of the supplied employees were considered for regular employment; the suppliers hired the supplied employees without any input from the user; the suppliers were responsible for disciplining and discharging the supplied employees; and the suppliers established and controlled the wages received by the supplied employees.